CAREN P. SENCER, Bar No. 233488
DAVID W. M. FUJIMOTO, Bar No. 299316
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
Telephone (510) 337-1001
Fax (510) 337-1023
E-Mail: NLRBnotices@unioncounsel.net
csencer@unioncounsel.net
dfujimoto@unioncounsel.net

Attorneys for Petitioner MACHINISTS AUTOMOTIVE TRADES DISTRICT LODGE NO. 190, MACHINISTS LOCAL 1173

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 32

FAA CONCORD T, INC., DBA CONCORD TOYOTA, Employer, and MACHINISTS AUTOMOTIVE TRADES DISTRICT LODGE NO. 190, MACHINISTS LOCAL 1173, Petitioner.	No. 32-RC-255130 **UNION'S OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW**

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

I. INTRODUCTION 1

II. ARGUMENT 2

A. THE EMPLOYER'S ENTIRE REQUEST FOR REVIEW IS BASED ON THE CHALLANGED BALLOT OF ONE EMPLOYEE, AND SINCE THE UNION WON BY TWO VOTES, RESOLUTION OF THESE ISSUES WILL NOT AFFECT THE OUTCOME OF THE ELECTION, THEREFORE RAISING NO SUBSTANTIAL ISSUE FOR THE BOARD 2

B. THE BOARD HAS RECENTLY DENIED REQUESTS FOR REVIEW ON NEARLY THE SAME BASES RAISED BY EMPLOYER BECAUSE *WARNER-LAMBERT* SUPPLIES THE CORRECT STANDARD IN SELF-DETERMINATION ELECTIONS 3

C. THE REQUEST FOR REVIEW DOES NOT ASSERT THAT THE REGIONAL DIRECTOR ERRED IN CONCLUDING THAT THE SERVICE ADVISORS ARE A DISTINCT IDENTIFIABLE VOTING GROUP AS REQUIRED BY *WARNER-LAMBERT* AND THEREFORE, THE REGIONAL DIRECTOR'S CONCLUSION ON THIS POINT WAS NOT CHALLENGED 7

D. WHILE THE REQUEST FOR REVIEW OSTENSIBLY OBJECTS TO THE FINDING THAT THE INTERNAL ADVISOR LACKS A COMMUNITY OF INTEREST WITH THE TECHNICIANS AND PARTS EMPLOYEES, ITS REQUEST MAKES NO ARGUMENTS ON THIS POINT, RESULTING IN THIS FINDING BEING UNCHALLENGED 7

E. IF THE BOARD FINDS THAT *BOEING* AND *PCC STRUCTURALS* APPLY TO SELF-DETERMINATION ELECTIONS, THE UNION HAS SHOWN THAT ALL SERVICE ADVISORS ARE AN APPROPRIATE UNIT UNDER *BOEING* 8

1. The Service Advisors are Themselves an Appropriate Unit 8

a. Service Advisors Share a Community of Interest with Each Other 9

TABLE OF CONTENTS (cont'd)

Page

i. All Service Advisors are Organized in the Same Department on Teams 9

ii. All Service Advisors have the Same Skills and Similar Functions 9

iii. There is Interchange Among the Service Advisors 10

iv. All Service Advisors Share Similar Pay Plans and Other Terms and Conditions of Employment....10

v. Same Work Location 11

vi. Consistent Interaction 12

vii. Exclusion of the Internal Advisor would result in a residual unit of one....12

b. The Cashiers and Warranty Administrator Have Distinct Interests in Collective Bargaining that Outweigh the Similiarities they Share with Services Advisors....12

i. While all of the Service Advisors, Technicians, Cashiers, and Warranty Administrator are in the Service Department under the Same Supervisor, it is only the Service Advisors and Technicians Who Work on Teams, While Cashiers and Warranty Administrators are not on Teams....13

ii. Service Advisors Sell Services and Write Repair Orders, While Cashiers and Warranty Administrators Do Not....13

iii. Interchange Among Service Advisors Weighs in Favor of Showing Distinctions Among them that Outweigh Similarities with Cashiers and the Warranty Administrator....14

TABLE OF CONTENTS (cont'd)

Page

iv. Service Advisors Occupy the Same Place in the Service Delivery Process and Have More in Common with Each other as it Relates to Functional Integration than the Cashiers and the Warranty Administrator who Occupy a Different Place in the Process 14

v. Frequent Contact 15

vi. On one of the Most Important Terms and Conditions of Employment—Compensation—Cashiers and the Warranty Administrator are Paid a Flat Hourly Rate, While the Service Advisors are all Paid with an Hourly Rate Plus Bonus 15

F. THE BOARD HAS NOT PRECLUDED THE ESTABLISHMENT OF UNITS OF SERVICE ADVISORS AND TECHNICIANS 16

III. CONCLUSION 17

TABLE OF AUTHORITIES

Page

Federal Cases

Dillon Cos. v. NLRB,
2020 U.S. App. LEXIS 5440 (D.C. Cir., Feb. 21, 2020) 4

Great Lakes Pipe Line Co.,
92 N.L.R.B. 583 (1950) 6

Kansas City Terminal Elevator Co.,
269 N.L.R.B. 350 (1984) 6

Lorillard Division of Loews Theatres,
219 N.L.R.B. 590 (1975) 6

Maryland Drydock Co.,
50 N.L.R.B. 363 (1943) 5, 6

NLRB v. Raytheon Co.,
918 F.2d 249 (1st Cir. 1990) 5, 6

Photype, Inc.,
145 N.L.R.B. 1268 (1964) 6

Westinghouse Electric & Mfg. Co.,
54 N.L.R.B. 272 (1944) 6

NLRB Cases

Alaska Communs. Sys. Holdings,
369 NLRB No. 17 (2020) 5

Boeing Company,
368 NLRB No. 67 (2019) ..... *passim*

Dillon Cos., Inc., *d/b/a King Soopers*,
367 NLRB No. 141 (2019), review denied 4

Great Lakes Pipe Line Co.,
92 NLRB at 584-85 6

King Soopers, Inc.,
2018 NLRB LEXIS 194, 2018 WL 2183312 (NLRB May 9, 2018) 4

King Soopers, Inc.,
27-RC-215705, 2018 NLRB LEXIS 353 (NLRB August 21, 2018) 3, 4, 5

Klochko Equipment Rental,
361 NLRB No. 49, slip op. (2014) 12

TABLE OF AUTHORITIES (cont'd)

Page

N.B.O. Stores, Inc.,
249 NLRB 1012 (1980) 2

PCC Structurals,
365 NLRB No. 160 ..... *passim*

R.H. Peters Chevrolet,
303 NLRB 791 (1991) 16

Republic Services of Southern Nevada,
365 NLRB No. 145 (2017) 4

Sacramento Automotive Association,
193 NLRB 745 (1971) 16

Vecellio & Grogan,
231 NLRB 136 (1977) 12

Victor Industries Corp. of California,
215 NLRB 48 (1974) 12

Warner-Lambert,
298 NLRB 993 (1990) ..... *passim*

Wheeling Island Gaming,
355 NLRB 637 (2010) 5

Regional Director Decisions

NLRB Reg. Dir. Dec. LEXIS 87 16

I. INTRODUCTION

The Union filed this RC petition seeking an Armour Globe self-determination election to add all nine Service Advisors to an existing unit of automotive technicians and parts employees. The Service Advisors are grouped by FAA Concord T, Inc. d/b/a Concord Toyota ("Employer") as customer pay advisors, floater advisors (both customer pay advisors and floater advisors hereinafter are referred to as "Customer Pay Advisors"),[1] and an internal advisor (together hereinafter referred to as "Service Advisors"). A preelection hearing was held during which the Employer contended that *Warner-Lambert*, 298 NLRB 993 (1990) was not the appropriate standard and, instead, that *Boeing Company*, 368 NLRB No. 67 (2019) applied to this self-determination election. The Employer contended at the hearing that, while the Customer Pay Advisors themselves shared a community of interest with each other, the Internal Advisor William Ortega ("Ortega" "Internal Advisor," or "Internal Advisor Ortega") did not share a community of interest with the Customer Pay Advisors. The Regional Director correctly applied the *Warner-Lambert* standard and concluded that all Service Advisors were a distinct, identifiable segment and that they shared a community of interest with the technicians and parts employees.

The Union initially won the election by a vote of four to three. The Employer challenged the ballot of Internal Advisor Ortega asserting that the Region should have applied *Boeing Company*, 368 NLRB No. 67 (2019) to find that Ortega's ballot should not be counted. The Regional Director overruled the challenge to Ortega's ballot on the basis that it applied the correct *Warner-Lambert* standard to this self-determination election. Ortega's ballot was opened, revealing that he voted for the Union. The Union won the election by a final vote of five to three. The Employer's entire Request for Review ("Request") is a challenge to Ortega's ballot. Regardless of the resolution of the merits of Employer's arguments about Ortega's ballot, the

[1] Evidence at the hearing, supported by a stipulation by the parties, showed that the only difference between floater advisors and customer pay advisors is that customer pay advisors are assigned to specific teams while floater advisors do the exact same work as customer pay advisors but are not assigned to one team, instead floating to different teams as needed.

Union wins the election. Ortega's ballot was ultimately not determinative to the outcome of the election. Therefore, there are no substantial issues warranting a grant of review.

If the Board does not reject the Employer's Request on that basis, there are still no grounds for granting the Employer's Request because the Regional Director properly applied *Warner-Lambert*, instead of *PCC Structurals*, 365 NLRB No. 160 and *Boeing*, to this self-determination election. The Board has similarly rejected granting requests for review that were nearly identical to the present one as recently as 2017 and 2018.

Separately, the Employer's Request should be denied because the Regional Director's DDE correctly concluded that the Service Advisors, including the Internal Advisor, constituted a separate identifiable voting group that shared a community of interest with the existing unit of technicians and parts employees.

Lastly, while *Boeing* does not apply, if the Board finds that *Boeing* does apply, the petitioned for unit of Service Advisors is appropriate, and the same consolidated with the existing unit of parts employees and technicians is also appropriate.

II. ARGUMENT

A. THE EMPLOYER'S ENTIRE REQUEST FOR REVIEW IS BASED ON THE CHALLANGED BALLOT OF ONE EMPLOYEE, AND SINCE THE UNION WON BY TWO VOTES, RESOLUTION OF THESE ISSUES WILL NOT AFFECT THE OUTCOME OF THE ELECTION, THEREFORE RAISING NO SUBSTANTIAL ISSUE FOR THE BOARD

When evaluating whether a request for review raises substantial issues in a representation election, the fact that the request is based on an issue that only applies to voters whose ballots are not determinative of the election results weighs against finding that substantial issues are raised. *See N.B.O. Stores, Inc*., 249 NLRB 1012, 1013 (1980) ("The Board denied the Respondent's request for review of the supplemental decision as raising no substantial issues warranting review with respect to the challenges to the ballots of employees Callendar, Schmidt, and Gross. As these challenges were sustained, the challenge to the ballot of employee Selzer was not determinative.").

Here, the Employer's entire Request for Review is based on the Regional Director's decision to overrule Employer's challenge to one ballot –that of Internal Advisor Ortega (Request at 1—"The Employer requests that the Board sustain the challenge to the ballot of Internal Advisor William Ortega and dismiss the petition. In the alternative, the Employer requests that the Board reverse the Decision and the DDE and remand to the Board [sic] to apply the correct legal standard"; Request at 5—"If the RD were to apply the correct Board precedent as the legal standard in examining the appropriateness of including the Internal Advisor in the unit, i.e., *The Boeing Company*, *supra*, the Regional Director should have found that that Employer's challenge to the ballot of William Ortega should be upheld."). Following the Regional Director's order, the challenged ballot of Ortega was opened. His vote was cast for the Union, resulting in a final tally of five for the Union and three against (May 7, 2020 Revised Tally of Ballots).

Since the Request seeks review of the decision to open Ortega's ballot, which ended up being non-determinative, it raises no substantial issues for review. If the Employer is somehow correct—it is not—that *Boeing* supplies the correct standard in a self-determination election, and if the Board were to find that Ortega was not eligible to vote, the Union would still win the election by a count of four to three. Therefore, this Request can be denied on this basis alone.

B. THE BOARD HAS RECENTLY DENIED REQUESTS FOR REVIEW ON NEARLY THE SAME BASES RAISED BY EMPLOYER BECAUSE *WARNER-LAMBERT* SUPPLIES THE CORRECT STANDARD IN SELF-DETERMINATION ELECTIONS

The Employer's Request is based on arguments that have been soundly rejected by the Board and the D.C. Circuit in recent years. The Board has recently denied two requests for review that challenged a Regional Director's application of *Warner-Lambert*, 298 NLRB 993 (1990) for a self-determination election by asserting that *Specialty Healthcare*, *PCC Structural*, and *Boeing* supplied the appropriate standard. In *King Soopers, Inc*., 27-RC-215705, 2018 NLRB LEXIS 353, *1 (NLRB August 21, 2018), the Board denied the employer's request for review, rejecting arguments similar to those raised by Employer in this Request. The employer

there contended that *PCC Structurals* governed, arguing that "The Regional Director has created a fractured and arbitrary unit, contrary to forty years of bargaining history between the Parties in an obvious attempt to revive *Specialty Healthcare's* deferential treatment to the Union's Petitioned-for unit." *See King Soopers, Inc.*, 2018 NLRB LEXIS 194, *2, 2018 WL 2183312 (NLRB May 9, 2018). Instead, the Board applied *Warner-Lambert* and found "that the deli employees are an 'identifiable, distinct segment."[2] *King Soopers*, 2018 NLRB LEXIS 353, *1, n.1.

Similarly, In *Republic Services of Southern Nevada*, 365 NLRB No. 145, n.1 (2017) the Board denied that request for review in part because *Specialty Healthcare* did not "involve[] a self-determination election, [or] purport to change the Board's longstanding standard for determining whether a self-determination election is appropriate."

Boeing also did not purport to change the Board's longstanding standard for determining whether a self-determination election is appropriate. *Boeing* did not involve a self-determination election and did not mention the term "self-determination election" or *Warner-Lambert* in its decision. *See generally Boeing*, 368 NLRB No. 67. As recognized by the D.C. Circuit, *Boeing* and *PCC Structurals* did not involve self-determination elections, but "addressed the different question whether the 'smallest appropriate unit must include employees excluded from the petitioned-for unit.'" *Dillon Cos.*, 2020 U.S. App. LEXIS 5440, at *3 (citing *PCC Structurals*, 365 NLRB No. 160 at 7 and *Boeing Co*., 368 NLRB No. 67 at 2).

For these reasons, Employer's bald assertion that the Board "recently announced the standards that should be applied when an existing unit is attempted to add [sic] additional employees but leave out others," (Req. at 7) is not supported by *Boeing* or any subsequent

[2] King Soopers later refused to bargain, setting up a test-of-cert case. The NLRB concluded that King Soopers violated section 8(a)(5) of the Act be refusing to bargain with the union. *Dillon Cos., Inc.*, *d/b/a King Soopers*, 367 NLRB No. 141 (2019), review denied, enf't granted by *Dillon Cos. v. NLRB*, 2020 U.S. App. LEXIS 5440 (D.C. Cir., Feb. 21, 2020) (stating that *Boeing* and *PCC Structurals* did not involve self-determination elections, but "addressed the different question whether the 'smallest appropriate unit must include employees excluded from the petitioned-for unit.'").

decision and is, in fact, contrary to the Board's recent rejection of the argument that *PCC Structurals* applies in self-determination elections. *King Soopers, Inc*., 2018 NLRB LEXIS 353, *1. As *Boeing* made clear, the Board was only seeking to clarify *PCC Structurals*. *Boeing*, 368 NLRB No. 67 at 3. Since the Board has already concluded that *PCC Structurals*[3] does not apply to self-determination elections, neither does *Boeing*.[4]

Employer's disingenuous effort to analogize *Boeing* to the present case should also be rejected. It states that in *Boeing* "the petitioner sought to create a collective bargaining unit from two classifications [sic] employees that would be represented by a union. . . . That scenario is no different from the one here, where Petitioner seeks to add three classifications . . . to the CBA of the Machinists and Teamsters." (Req. at 9). In fact, the Board since at least 1943, *see, e.g., Maryland Drydock Co*., 50 N.L.R.B. 363 (1943), has drawn a clear distinction between self-determination elections and elections of completely new units. The Employer does not address these cases which remain binding precedent.

The reason that *Specialty Healthcare, PCC Structurals*, and *Boeing* do not apply to self-determination elections—besides the fact that these decisions did not involve self-determination

[3] The Board in *PCC Structurals* justified its return to a traditional analysis on the basis that "the Board traditionally has determined, in each case in which unit appropriateness is questioned, whether the employees in a petitioned-for group share a community of interest sufficiently distinct from the interests of employees excluded from the petitioned-for group ***to warrant a finding that the proposed group constitutes a separate appropriate unit.***" 365 NLRB No. 160 at 5 (emphasis added). The Board cited *Wheeling Island Gaming*, 355 NLRB 637 (2010), for the proposition that "Our inquiry . . . necessarily proceeds to a further determination whether the interests of the group sought are sufficiently distinct from those of other employees to warrant the ***establishment of a separate unit***." *PCC Structurals*, 365 NLRB No. 160 at 5 (emphasis added). *PCC Structurals*, by its terms and facts, applies to where a union seeks a separate, standalone unit. Our case, by stark contrast, does not seek a separate unit, but seeks a self-determination election, which does not require a finding that the petitioned-for unit to be added to the existing unit be itself an appropriate unit. *NLRB v. Raytheon Co*., 918 F.2d 249, 252 (1st Cir. 1990) (citing several Board decisions).

[4] The Board this year concluded that *Boeing* did not represent special circumstances that warranted de novo re-examination of whether employees who voted in a self-determination election shared a community of interest with its employees in the existing bargaining unit represented by the Union. *See Alaska Communs. Sys. Holdings*, 369 NLRB No. 17 (2020). This further supports that the standards for self-determination elections was not affected by *Boeing*.

elections and did not purport to extend their application to self-determination elections—is that there is a well-established and longstanding principle that a self-determination election can be directed even though the petitioned-for unit itself might not be an appropriate unit:

> *Armour* itself has been expanded to permit self-determination elections where there was no separate finding that the group of employees who were voting to join a unit was, by itself, an appropriate unit, see, e.g., *Maryland Drydock Co*., 50 N.L.R.B. 363 (1943), and where the Board found that, although the voting unit was not appropriate by itself, the employees were nevertheless entitled to a self-determination election in which a vote for the union would be treated as a vote for inclusion in the existing bargaining unit. *See, e.g., Westinghouse Electric & Mfg. Co.*, 54 N.L.R.B. 272 (1944); *see also Great Lakes Pipe Line Co.*, 92 N.L.R.B. 583, 585-86 & n. 7 (1950) (rejecting contention that election may be held only in group which would constitute separate appropriate unit); *Photype, Inc*., 145 N.L.R.B. 1268, 1272-74 & n. 8 (1964) (expressly declining to decide whether employees who sought to be added to existing unit would be separate appropriate unit); *Lorillard Division of Loews Theatres*, 219 N.L.R.B. 590 (1975) (employees found not to be a separate appropriate unit, but granted opportunity to join existing unit through a self-determination election); *Kansas City Terminal Elevator Co.,* 269 N.L.R.B. 350, 351-52 (1984) (union represented employees at one of two elevators; Board found that the other elevator was not a separate appropriate unit, but allowed those employees to vote to join the existing unit or remain unrepresented).

Raytheon Co., 918 F.2d at 252. The present petition seeks to add the service advisors—including the customer pay advisors, floater advisors, and internal advisor—to the existing unit of service technicians and parts department employees. This petition does not seek a standalone unit so *Boeing*[5] and *PCC Structurals* do not apply.[6] *Warner-Lambert* supplies the appropriate standard

---

[5] *Boeing* recognized the limited scope of *PCC Structurals* by stating that under the *PCC Structurals*, "when a party asserts that *the* ***smallest appropriate unit*** must include employees excluded from the petitioned-for unit, the Board applies its traditional community-of-interest factors 'to determine whether the petitioned-for employees share a community of interest sufficiently distinct from employees excluded from the proposed unit to warrant a separate appropriate unit.'" 368 NLRB No. 67 at 2 (emphasis added).

[6] The reasoning of *PCC Structurals* does not support its application to petitions seeking self-determination elections. The assessment of whether the employees' "interests are sufficiently distinct from those of employees excluded from the petitioned-for group . . . ensures that bargaining units will not be arbitrary, irrational, or "fractured"—that is, composed of gerrymandered grouping of employees . . . ." 365 NLRB No. 160 at 3. In *Armour-Globe* elections—like this one—where the union seeks to join an unrepresented group of employees into an existing unit, the same risk of arbitrary or fractured units is not present. This is because there is already an existing unit and the union does not seek to create an additional unit that might actually result in gerrymandering or fracturing. *See Great Lakes Pipe Line Co.*, 92 NLRB at 584-85 ("far from constituting a gerrymandering practice, the use of the 'Globe' type election as here directed, is in fact an effective guarantee against the very gerrymandering practices envisaged by our dissenting colleague.").

and the Region was correct in so concluding. Therefore, the Employer's Request does not raise substantial issues for review as existing precedent was consistently applied.

C. THE REQUEST FOR REVIEW DOES NOT ASSERT THAT THE REGIONAL DIRECTOR ERRED IN CONCLUDING THAT THE SERVICE ADVISORS ARE A DISTINCT IDENTIFIABLE VOTING GROUP AS REQUIRED BY *WARNER-LAMBERT* AND THEREFORE, THE REGIONAL DIRECTOR'S CONCLUSION ON THIS POINT WAS NOT CHALLENGED

In addition to contesting the proper standard to apply to a self-determination election, the Employer bases its Request on the contention that "The RD's DDE decision finding of a shared community of interest between the Internal Advisor and the Retail Service Advisors . . . is clearly erroneous based on the record and such error prejudicially affects the rights of the Employer." (Req. at 5). The DDE concluded that the Service Advisors, including the Internal Advisor, were an "identifiable, distinct segment," as required by *Warner-Lambert* (at 8). Since Employer does not contend otherwise, this finding of the Regional Director remains unchallenged.[7]

D. WHILE THE REQUEST FOR REVIEW OSTENSIBLY OBJECTS TO THE FINDING THAT THE INTERNAL ADVISOR LACKS A COMMUNITY OF INTEREST WITH THE TECHNICIANS AND PARTS EMPLOYEES, ITS REQUEST MAKES NO ARGUMENTS ON THIS POINT, RESULTING IN THIS FINDING BEING UNCHALLENGED

The Employer Request for Review states in the Summary of Evidence and Argument that "[t]he RD's DDE decision finding of a shared community of interest . . . between the Internal Advisor and the existing blue-collar unit of technicians is clearly erroneous based on the record and such error prejudicially affects the rights of the Employer." (Req. at 5). However, the argument of the Request does not address this issue. Part III.A sets out legal standards, Part III.B argues about Regional Director's use of the *Warner-Lambert* standard, Part III.C argues that that *Boeing* should have been applied, Part III.D lays out the three-step *Boeing* analysis, Part III.E argues that the Internal Advisors don't share a community of interest with the other Advisors, Part III.F argues that the distinct interests of the excluded employees do not outweigh similarities

[7] Excluding Internal Advisor Ortega would result in a residual unit of one. *Infra* Part II.E.1.a.vii.

with the petitioned for employees, and Part III.G. argues about supposed historical exclusion of service advisors from units of employees that contain technicians/mechanics.

The Employer does not seriously contend that the Service Advisors generally, or the Internal Advisor specifically, lack a community of interest with the technicians and parts employees. To be sure, the Request at page 17 states, "The distinct interests of the excluded employees—the Cashiers and the Warranty Administrator, do not outweigh the similarities with the petitioned-for employees—the Service Advisors, the two Floater Advisors, and the Internal Advisor." Therefore, the Regional Director's finding that the Service Advisors share a community of interest with the technician-parts employees unit remains unchallenged.[8]

E. IF THE BOARD FINDS THAT *BOEING* AND *PCC STRUCTURALS* APPLY TO SELF-DETERMINATION ELECTIONS, THE UNION HAS SHOWN THAT ALL SERVICE ADVISORS ARE AN APPROPRIATE UNIT UNDER *BOEING*

1. The Service Advisors are Themselves an Appropriate Unit

In the present case, the Customer Pay Advisors and Floater Advisors share a community of interest. The Service Manager testified that the only difference between the Customer Pay Advisors and the Floater Advisors is that the Floaters "float. Other than that, they are the same." (Testimony of Oliver). They have the same pay plan as the other Customer Pay Advisors and there is no difference in qualifications (*Id.*). Furthermore, a stipulation was entered into that there is a community of interest between the Customer Pay Advisors[9] and the Floater Advisors.

The only remaining issue regarding the Service Advisors is whether the Internal Advisor also shares a community of interest with the Customer Pay Advisors and the Floater Advisors. For the reasons that follow, the Internal Advisor shares a community of interest with the other Service Advisors.

[8] If the Board finds that the Employer did raise this issue in its Request, the Union incorporates its discussion on this issue from the Post-Hearing Brief at Part II.D.

[9] For the purpose of the hearing, customer pay advisors were referred to as service advisors. The union contends that all of the advisors are service advisors.

a. Service Advisors Share a Community of Interest with Each Other

i. All Service Advisors are Organized in the Same Department on Teams

Cathyrine Oliver ("Oliver") is the Service Manager of the Service Department (Oliver Testimony). Her duties include overseeing the Service Department (*Id.*). She supervises the Service Advisors, including the customer pay advisors, Internal Advisor, and Floater Advisors (*Id.*). Even though the Internal Advisor works on the Used Car team under the Used Car manager, the Service Manager will approve warranty claims for repairs on new cars and is the primary contact for approval (Ortega Testimony).

The Service Department includes each of the four teams (Employer Ex. 2). Three teams are customer pay teams and one used car team (Oliver Testimony). Internal Advisor Ortega testified that his business card itself says that he is a service advisor (Ortega Testimony). While Ortega offered to show a photograph of his business card, Respondent's counsel was not interested in having that shown for the record (*See id.*). Since all Service Advisors are on teams in the Service Department, this factor weighs in favor of finding a community of interest.

ii. All Service Advisors have the Same Skills and Similar Functions

All Service Advisors have some customer interaction. (Oliver and Ortega Testimony). The Internal Advisor communicates with customers on occasion if a customer needs a repair that is not a factory-covered item or subject to a warranty (Ortega Testimony). If the sales manager indicates that the repair is not covered, the Internal Advisor then sells the repair (*See id*.). While Ortega has not recently had to cover for customer pay Advisors, he has done the work for Employer in the past and is able to do the work.

All Service Advisors know how to write repair orders for both new and used cars. (Oliver and Jonathan Ramirez ("Ramirez") Testimony). Ortega, the Internal Advisor, worked previously for the Employer as a customer pay Advisor (Testimony of Ortega). On the weekends, customer pay advisors write internal service for used cars. (Ramirez Testimony). While the evidence did not show that interchange occurred on a constant, daily basis, the evidence showed that there is

considerable overlap in skills in that the Internal Advisor can do all customer pay work and the customer pay Advisors can do some of the Internal Advisor's work (Ortega, Ervin, and Ramirez Testimony). This factor also weighs in favor of finding a community of interest.

iii. There is Interchange Among the Service Advisors

Since there is considerable skill overlap, not surprisingly, there is interchange that occurs between the Internal Advisor and the other Advisors. Within a week prior to the hearing, when the Service manager learned that the customer pay Service Advisors were subpoenaed to the pre-election hearing, she was going to ask Ortega to cover for the Customer Pay Advisors in their absence (Oliver Testimony). Ortega would have worked the service drive as the customer pay advisors do (*Id.*). This was undoubtedly because Ortega for years worked as a Customer Pay Advisor before he became a dedicated internal advisor (Ortega Testimony). Oliver testified that she asked Ortega to fill in because "he knows how to write a repair order." (Oliver Testimony). Furthermore, if something caused absences among the Customer Pay Advisors, Ortega would be able to cover for them.

Floater Advisor Ramirez testified that he and other Customer Pay Advisors working on Saturdays have worked with used cars on Saturdays when Ortega, the Internal Advisor, does not work (Testimony of Ramirez).[10] At the end of 2019, Ervin took care of a due bill customer for the Internal Advisor Ortega, who was out to lunch (Ervin Testimony). This means that the Customer Pay Advisors cover for the Internal Advisor on Saturdays and when he is on breaks. There is interchange that shows that they share a community of interest.

iv. All Service Advisors Share Similar Pay Plans and Other Terms and Conditions of Employment

All Service Advisors have a similarly structured pay plan. Customer Pay Advisors, including the floaters, have the pay plan detailed in Employer Exhibit 1. The Internal Advisor pay plan is Employer Exhibit 5. Both pay plans include a base hourly rate (Element 1 on both

[10] Ramirez's detailed and specific testimony contradicted the Service Manager's general and vague testimony that, while floaters help out other teams, they do not help the Internal Advisor.

pay plans) and a commission (Element 2 on both pay plans). The difference in the pay plans relates to the differences in primary duties between the Internal Advisor and customer pay advisors (*Compare* Testimony Regarding Duties *with* Employer Exs. 1 & 5). It is clear that the Company has sought to incentivize productivity for all Service Advisors through its pay plans. Both pay plans include an identical, word-for-word paragraph on "**Draws against Commissions/Advances**" (Co. Exs. 1 & 5). Both pay plans contain a nearly identical paragraph on **Payment of Commissions and Bonuses**, with the only difference being the day of the month by when the earned compensation must be calculated (*Id.*). Both pay plans contain identical paragraphs regarding "**Attendance Documentation**" and "**Meal Breaks and Rest Periods**," as well as an identical separate section entitled "**Notice**," which includes a reservation of the right to change or terminate the pay plan, a purported agreement to express disputes over the amount of wages paid in writing, an at-will paragraph, and a forced arbitration paragraph (*Id.*).

Furthermore, the employee handbook applies equally to all Service Advisors equally since they are not currently covered by the CBA (Testimony of Oliver). All Service Advisors are eligible to participate in a company-sponsored 401k plan (Testimony of Oliver).

This factor weighs heavily in favor of finding that all Service Advisors share a community of interest.

v. Same Work Location

Service Advisors are at the front entrance of the building; to get into shop, there are 2 bay doors on outside to drive into and a connecting door into advisor area (Testimony of Oliver). Customer pay advisors don't work in shop, they work in the service drive or service office—where customers come in (*Id.*). The Internal Advisor works behind cashiers (*Id*.). The customer pay Advisors sometimes help with the cashiers and the Internal Advisor works in the same office as the cashiers (*Id*.). While they do not work exactly in the office, they work amongst each other and are not so separated as to weigh against finding a community of interest.

vi. Consistent Interaction

The Internal Advisor communicates with customer pay Advisors periodically, such as when a customer pay Advisor notifies the Internal Advisor that a customer is waiting or a customer they are helping is requesting authorization for a warranty or factory paid repair (Testimony of Ortega). This communication likely occurs as frequently as the communication between the Customer Pay Advisor for Team 4 and the Customer Pay Advisor for Team 3. This is because each Customer Pay Advisor is primarily working with technicians and parts employees throughout the day (*See* Ervin Direct).

vii. Exclusion of the Internal Advisor would result in a residual unit of one

The Board is reluctant to leave a single employee out of a unit where that would result in that employee being unable to exercise Section 7 rights to representation. *Klochko Equipment Rental*, 361 NLRB No. 49, slip op. at 1 fn. 1 (2014); *Vecellio & Grogan*, 231 NLRB 136, 136–137 (1977); *Victor Industries Corp. of California*, 215 NLRB 48, 49 (1974). The evidence shows that the Internal Advisor shares far more in common with the other Service Advisors than the cashiers, with whom he has minimal interaction, no job overlap, and a differently structured pay plan. To conclude that he does not share a community of interest with the other Service Advisors would result in him being left out of both the Service Advisor unit and a potential future cashier unit, effectively unable to exercise Section 7 rights.

b. The Cashiers and Warranty Administrator Have Distinct Interests in Collective Bargaining that Outweigh the Similiarities they Share with Services Advisors

The distinct interests of the Cashiers and Warranty Administrator outweigh the similarities with the Service Advisors. There are five cashiers and one warranty admin (Oliver Testimony). Given that the Cashiers and Warranty Administrators are not placed on teams within the organizational structure, have separate duties and skills, share a common place with each other within the service delivery process, and are paid only on an hourly basis, they share distinct interests important for collective bargaining that outweigh their similarities with the Service Advisors.

i. While all of the Service Advisors, Technicians, Cashiers, and Warranty Administrator are in the Service Department under the Same Supervisor, it is only the Service Advisors and Technicians Who Work on Teams, While Cashiers and Warranty Administrators are not on Teams

The Service Advisors, including the Internal Advisor, all work on teams, a system that has been in place since November 2019 (Employer Ex. 2; Testimony of Oliver). Ortega is on Team 1 and works with technicians (*Id.*). The other teams each include Service Advisors and technicians (*Id.*). Each team has a team leader, who is a technician, that dispatches work to the technicians (*Id.*). Even when used cars are being reconditioned, the team lead also dispatches the work to technicians (*Id*.). Floater Service Advisors can work on any of the teams (*Id.*).

This shows a greater commonality amongst all Service Advisors and technicians, including the Internal Advisor, than between the Service Advisors and the Cashiers and Warranty Administrator. This also means that Cashiers and the one Warranty Administrator are left to be among themselves within the organizational structure. Whereas the Service Advisors work on teams with technicians, the Cashiers and Warrant Administrator are effectively on a team of their own. That the Cashiers and Warranty Administrator have their own meetings helps illustrate this dynamic (Oliver Testimony). This is important because it helps set the stage for Service Advisors' relationship to their work and with other employees. The fact that Service Advisors are all on teams with technicians, while Cashiers and Warranty Clerks are not, shows a distinction among them that outweigh the similarities between them and the Cashiers and Warranty Clerk .

ii. Service Advisors Sell Services and Write Repair Orders, While Cashiers and Warranty Administrators Do Not

Quite simply, all Service Advisors, including the Internal Advisor, write repair orders; Cashiers and Warranty Clerks do not. As such, all Service Advisors carry portable tablets (Surface Pros), while Cashiers work at a computer where the cashiers work and the Warranty

Administrator works at a computer that is not at the shop (Oliver Testimony). A part of Service Advisors' work involves inspecting vehicles (Ervin Testimony; Ortega Testimony). Cashiers do not conduct inspections of vehicles (Ervin Testimony).

The similarity in duties among the Service Advisors shows a distinction among them that outweighs any similarities between them and the Cashiers and Warranty Clerk.

iii. Interchange Among Service Advisors Weighs in Favor of Showing Distinctions Among them that Outweigh Similarities with Cashiers and the Warranty Administrator

Based on the interchange among Service Advisors, *see supra* Part II.E.1.a.iii, coupled with the lack of ability of the Warranty Administrator and Cashiers to write repair orders or conduct inspections of vehicles, there is interchange that occurs among Service Advisors that cannot and does not occur between Service Advisors and Cashiers or Service Advisors and the Warranty Administrator.

iv. Service Advisors Occupy the Same Place in the Service Delivery Process and Have More in Common with Each other as it Relates to Functional Integration than the Cashiers and the Warranty Administrator who Occupy a Different Place in the Process

Service advisors share more commonalities in relation to the workflow with each other than they share with the Cashiers and Warranty Administrator. Service advisors write up the repair orders. When the repair is done, they contact the customer to return to the shop (*Compare* Ervin Testimony—*with* Ortega Testimony). Paperwork goes from Service Advisor to cashier and then to the Warranty Administrator. Oliver). The Warranty Admin communicates with the factory about a warranty/factory pay and if the factory denies that it should be covered, the Warranty Administrator communicates to the Service Advisor about it and rarely, if ever, would have customer contact. (Oliver Testimony).

The internal advisor only communicates with cashiers a few times a day, but communicates with parts employees and technicians regularly throughout the day (Ortega Testimony). The Customer Pay Advisors regularly interact with technicians and parts employees (Ervin Testimony). Based on the cashiers' place in the service delivery process—they obtain the

repair order once it is done and assist customers in paying for the service—they do not interact regularly with technicians and parts employees during the course of their work.

While there is functional integration between Service Advisors and Cashiers and the Warranty Administrator, the Service Advisors all occupy the same link in the chain of service delivery at the dealership. They therefore share more in common with each other than they share with the Cashiers and Warranty Clerk.

v. Frequent Contact

While frequent contact is a relevant factor, simply working in the same area alone does not weigh heavily in finding a community of interest. Here, the evidence showed that there was interaction between Customer Pay Service Advisors and cashiers. There was also evidence of interaction between Ortega and other Service Advisors, such as when other Service Advisors inform Ortega that a customer is waiting or needs authorization from a sales manager (Ortega Direct). Ortega also works near the registers where the Cashiers work, and other Service Advisors are oftentimes near the registers. This factor is neutral under the second step of *Boeing*.

vi. On one of the Most Important Terms and Conditions of Employment—Compensation—Cashiers and the Warranty Administrator are Paid a Flat Hourly Rate, While the Service Advisors are all Paid with an Hourly Rate Plus Bonus

As expected, all non-unionized employees share terms and conditions of employment such as employer policies and handbooks. But there are significant differences in means and ranges of compensation. All Service Advisors share commonalities in their pay plan that are not present among Cashiers and the Warranty Advisor. Cashiers are compensated on an hourly basis and do not receive a bonus or commission (Oliver Testimony). This is in stark contrast to the Service Advisors who are all compensated based on an hourly rate plus bonuses and/or commissions (Employer Exs. 1, 3, & 5; Oliver Cross). This is significant because Service Advisors' pay plans can be confusing and it can be difficult to know whether they are properly being compensated for their work (*See* Ortega). Cashiers and Warranty Clerks, on the other

hand, are paid a straight hourly rate—that's it. They only have to look at how many hours they worked and their rate to determine whether they are being compensated correctly.

For the Warranty Administrator and Cashiers, this means that they are paid the same each week with no opportunity for performance based bonuses or commissions. This is a significant difference that distinguishes them from the Service Advisors.

The similarities among Service Advisors's pay plans establishes a distinction among them that helps outweigh the similarities between them and the Cashiers and Warranty Clerk in matters important to collective bargaining.

F. THE BOARD HAS NOT PRECLUDED THE ESTABLISHMENT OF UNITS OF SERVICE ADVISORS AND TECHNICIANS

There is a long history of units in dealership that both include technicians and service advisors in the same unit. Nothing precludes them from being in the same unit and Employer's counsel, who has served as counsel for the new car dealers association, has frequently taken the position that the only appropriate unit requires service advisors be included with technicians—as recently as four days ago.[11]

Furthermore, the cases on which the Employer relies "address a situation not involved here of a union petitioning to exclusively represent a craft unit." 2013 NLRB Reg. Dir. Dec. LEXIS 87, *17. Instead, in other situations, the Board applies community of interest factors. *Sacramento Automotive Association*, 193 NLRB 745 (1971) (finding a community of interest between service writers and mechanics and ordered a self-determination election for potential inclusion of service writers in an already represented unit of service department employees). *R.H. Peters Chevrolet*, 303 NLRB 791 (1991) (ordering service advisors to be included in a bargaining unit of mechanics, body shop, and parts department employees where the stipulated election agreement was vague on whether service advisors were included or excluded). Therefore, the Employer's cases do not determine the appropriateness of adding the Service

[11] The Union Requests Administrative Notice of the Statement of Position dated May 18, 2020, filed by Employer's counsel in 32-RC-260453.

Advisors to the existing unit and since there is a community of interest shared between the Service Advisors and the existing unit, their inclusion in that unit is appropriate.

III. CONCLUSION

For the foregoing reasons, the Union respectfully requests that the Region deny Employer Request for Review.

Dated: May 22, 2020

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: DAVID W. M. FUJIMOTO

Attorneys for Petitioner MACHINISTS AUTOMOTIVE TRADES DISTRICT LODGE NO. 190, MACHINISTS LOCAL 1173

148961\1084636

PROOF OF SERVICE
(CCP §1013)

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On May 22, 2020, I served the following documents in the manner described below:

UNION'S OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW

☑ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from smendez@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

Mr. John P. Boggs
Fine, Boggs & Perkins LLP
111 West Ocean Blvd., Suite 2400
Long Beach, CA 90802
(562) 490-8561 (fax)
jboggs@employerlawyers.com

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on May 22, 2020, at Alameda, California.

Sally Mendez